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10/564,593	01/13/2006	Stephen William Sankey	DTG1-127US	1797
31344	7590	09/30/2009	EXAMINER	
RATNERPRESTIA			KASHNIKOW, ERIK	
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/564,593	<b>Applicant(s)</b> SANKEY ET AL.	
	<b>Examiner</b> ERIK KASHNIKOW	<b>Art Unit</b> 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 14 July 2009.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-28,31 and 33-47 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-28,31 and 33-47 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)            | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | Paper No(s)/Mail Date. _____                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>07/14/09</u> .  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 07/14/09 has been entered.

### ***Claim Rejections - 35 USC § 112***

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claim 47 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The claim is rejected because the term consisting of is not open language, and as such an object that is consisting of two layers may not optionally contain a third layer.

### ***Claim Rejections - 35 USC § 103***

4. Claims 1-10, 12-15, 20-24, 27, 28, 31, 34, 36, 41 and 43-47 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lin (WO 01/92000).

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In regards to claims 1, 3, 4, 6-10, 12-14, 44 and 47 Lin teaches a dual layer film comprising one layer that has been perforated and one layer that has not been perforated (page 3 lines 35-32). Lin teaches that the perforated layer may comprise polyethylene terephthalate (hereinafter PET) and the unperforated layer comprises a polyester (page 7 lines 17-32). In regards to Applicant's arguments concerning the thickness of the film layers, the size and density of the perforations it has long been an axiom of United States patent law that it is not inventive to discover the optimum or workable ranges of result-effective variables by routine experimentation. *In re Peterson*, 315 F.3d 1325, 1330 (Fed. Cir. 2003) ("The normal desire of scientists or artisans to improve upon what is already generally known provides the motivation to determine where in a disclosed set of percentage ranges is the optimum combination of percentages."); *In re Boesch*, 617 F.2d 272, 276 (CCPA 1980) ("[D]iscovery of an optimum value of a result effective variable in a known process is ordinarily within the skill of the art."); *In re Aller*, 220 F.2d 454, 456 (CCPA 1955) ("[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation."). "Only if the 'results of optimizing a variable' are 'unexpectedly good' can a patent be obtained for the claimed critical range." *In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997) (quoting *In re Antonie*, 559 F.2d 618, 620 (CCPA 1977)). Therefore absent a showing of criticality with respect to " thickness of the film layers and the size and density of the perforations " (a result effective variable), it would have been obvious to a person of ordinary skill in the art at the time of the invention to adjust the " thickness of the film layers and the size and

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density of the perforations " through routine experimentation to values, including those presently claimed in order to achieve "a package which finely controls the final condition of that packaged therein (page 14 lines 22-30)". It is noted that as Lin uses the same materials as those preferred by applicants the film must necessarily be heat sealable as well as have the same water vapor transmission rate. It is noted that in regards to claim 47 the optionally perforated heat seal layer is not included.

5. In regards to claim 2 Lin teaches that the film is permeable to water vapor and air (which one of ordinary skill in the art would realize contains oxygen)(page 5 lines 5-10).

6. In regards to claim 5 Lin teaches that the unperforated layer is disposed on a surface of the perforated (substrate) layer (page 5 lines 25-32 and figures 2B and 2C).

7. In regards to claim 15 this is just a duplication of parts (See MPEP 2144.04 VI) since Lin has previously stated that polyesters can be used as both a heat seal layer and the substrate layer. The courts have held that mere duplication of parts has no patentable significance unless it results in a new and unexpected result.

8. In regards to claims 20, 21 and 45 Lin et al. teach that it is preferable that the film is transparent, and therefore would have a light transmittance at or near 100% (page 12 lines 26-32), it would be obvious to one of ordinary skill in the art at the time of the invention to limit the haze in transparent sections in order to provide a clear view of the item packaged, this would include embodiments below 6%.

9. In regards to claims 22-24, 28, 41 and 43 Lin previously taught all the limitations associated with the article and further teaches that the film is formed perforating the layer then adding the other layers (page 4 lines 1-14). It is further noted that the

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broadest definition of the term laminated is “to make by uniting several layers”

(<http://dictionary.reference.com/browse/laminate>).

10. In regards to claim 27 while Lin is silent with regards to the barrier layer being extruded they did teach that it is known in the art to extrude layers for breathable films (page 2 lines 9-18).

11. In regards to claim 34 while Lin does not specifically mention that the containers contain cut plants, they do specifically mention that the containers are to hold foodstuffs, of which fruits and vegetables are common food items that are also cut plants (page 13 lines 30-32).

12. In regards to claim 36 Lin teaches that the container may be used for foods that are cooked in a microwave oven (page 14 lines 1-15).

13. In regards to claim 46 Lin teaches that it is not the material of the barrier layer but rather a sealing layer that fills in the perforations, therefore 0% of the perforations are filled by the unperforated barrier layer (page 3 lines 26-32).

14. Claims 11 and 42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lin (WO 01/92000) in view of Rogers (US 4,918,156).

15. As stated above Lin teaches films for use in packaging as well as methods for making said films, but however is silent regarding using copolyesterether as the substrate.

16. Rogers teaches polyester resins which offer improved processability during manufacture (column 1 lines 5-6).

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17. Rogers teaches that this polyester is a copolyesterether formed from 1,4-cyclohexanedimethanol (column 1 lines 5-10).

18. One of ordinary skill in the art at the time of the invention would be motivated to modify the package of Lin with the polyester of Rogers, because the polyester of Rogers offers improved processability during manufacture (column 1 lines 5-10) and a decrease in film splitting (column 2 lines 49-50).

19. Claims 16, 37 and 38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lin (WO 01/92000) in view of Dominguez De Walter et al. (US 6,787,630 and hereinafter Dominguez).

20. As stated above Lin teaches films for use in packaging as well as methods for making said films, but however is silent regarding the heat sealable layer comprising ethylene glycol, terephthalic and isophthalic acid.

21. Dominguez teaches heat stable polyesters which are easily reproduced (column 1 lines 7-10).

22. In regards to claim 16 Dominguez teaches copolyesters derived from ethylene glycol, and terephthalic and isophthalic acid (column 13 lines 1-10). In regards to the concentrations it has been found that absent a showing of criticality with respect to "acid ratios" (a result effective variable), it would have been obvious to a person of ordinary skill in the art at the time of the invention to adjust the "acid ratios" through routine experimentation to values, including those presently claimed in order to achieve "polyesters with good color, and reduced degradation". It has been held that

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discovering an optimum value of a result effective variable involves only routine skill in the art. In re Boesch, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

23. One of ordinary skill in the art at the time of the invention would be motivated to modify the package of Lin with the copolyester of Dominguez because the copolyester of Dominguez offers outstanding clarity and coloring neutrality (column 1 lines 15-16).

24. Claims 17, 39 and 40 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lin (WO 01/92000) in view of McConnell et al. (US 4,450,250).

25. As stated above Lin teaches films for use in packaging as well as methods for making said films, but however is silent regarding a copolyester derived from ethylene glycol, terephthalic acid and cyclohexanedimethanol.

26. McConnell et al. teach adhesive polymers.

27. In regards to claim 17 McConnell et al. teach a known adhesive polymer which is derived from ethylene glycol, terephthalic acid as well as 1,4-cyclohexanedimethanol (column 3 lines 51-60).

28. One of ordinary skill in the art at the time of the invention would be motivated to modify the film of Lin with the polyester adhesive of McConnell et al. because the adhesive composition of McConnell et al. which is well known in the art offers an ability to bind to a wide variety of materials as well as offering good cohesive and bond strengths and improved processing characteristics (column 1 lines 11 and 18-23).



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29. Claims 18 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lin (WO 01/92000) in view of Harrington (US 4,172,824).

30. As stated above Lin teaches films for use in packaging as well as methods for making said films, but however is silent regarding a specific heat seal composition comprising an aromatic dicarboxylic acid, and aliphatic dicarboxylic acid and a glycol.

In regards to claims 18 and 19 Harrington et al. teach a hot melt adhesive compound which comprises terephthalic acid and adipic acid and the glycol component is ethylene glycol (column 2 lines 20-30). Harrington et al. disclose the use of about 60% aromatic dicarboxylic, while the present claims require 55% aromatic dicarboxylic.

It is apparent, however, that the instantly claimed amount of 55% and that taught by Harrington et al. are so close to each other that the fact pattern is similar to the one in In re Woodruff , 919 F.2d 1575, USPQ2d 1934 (Fed. Cir. 1990) or Titanium Metals Corp. of America v. Banner, 778 F.2d 775, 227 USPQ 773 (Fed.Cir. 1985) where despite a “slight” difference in the ranges the court held that such a difference did not “render the claims patentable” or, alternatively, that “a prima facie case of obviousness exists where the claimed ranges and prior art ranges do not overlap but are close enough so that one skilled in the art would have expected them to have the same properties”.

In light of the case law cited above and given that there is only a “slight” difference between the amount of about 60% disclosed by Harrington and the amount disclosed in the present claims, it therefore would have been obvious to one of ordinary

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skill in the art that the amount of 55% disclosed in the present claims is but an obvious variant of the amounts disclosed in Harrington et al., and thereby one of ordinary skill in the art would have arrived at the claimed invention.

31. One of ordinary skill in the art at the time of the invention would be motivated to modify the film of Lin with the polyester component of Harrington et al. because the polyester component of Harrington et al. offers an excellent softening points and inherent viscosities (column 2 lines 22-33).

32. Claims 25 and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lin (WO 01/92000) in view of Wang et al. (6,143,818).

33. As stated above Lin teaches films for use in packaging as well as methods for making said films, but however is silent regarding the method of applying an adhesive and using EVOH as an adhesive.

34. In regards to claim 25 Wang et al. teach spray melt blown methods as common methods for applying adhesives (column 1 lines 50-57).

35. In regards to claim 26 Wang et al. teach an adhesive which comprises ethylene vinyl alcohol (claim 11).

36. One of ordinary skill in the art at the time of the invention would be motivated to modify the invention of Lin with the adhesive of Wang et al. because the adhesives of Wang et al. offer improved cohesive strength as well as excellent heat stability (column 3 lines 20-27).

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37. Claims 31, 34 and 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lin (WO 01/92000) in view of Zobel (US 5,832,699).

38. As stated above Lin teaches films for use in packaging as well as methods for making said films, but however is silent regarding cut plants being included in the container.

39. Zobel teaches films which comprise a perforated layer (column 4 lines 1-20).

40. In regards to claims 31 34 and 35 Zobel et al. teach that it is known in the art that films with perforations are used to store vegetables, which are cut plant material (column 3 lines 55-63).

41. One of ordinary skill in the art at the time of the invention would be motivated to modify the invention of Lin with that of Zobel et al. because the invention of Zobel et al. offers an ability to regulate a changing atmosphere in a package (column 1 lines 17-30).

42. Claim 33 is rejected under 35 U.S.C. 103(a) as being unpatentable over Lin (WO 01/92000) in view of Varriano-Martson (US 6,441,340 hereinafter Varriano).

43. As stated above Lin teaches films for use in packaging as well as methods for making said films, but however is silent regarding the film being used as a lid for a package.

44. In regards to claim 33 Varriano teaches containers with lids made from breathable films (column 18 lines 36-50).

45. One of ordinary skill in the art at the time of the invention would be motivated to modify the invention of Akao with that of Varriano because the invention of Lin would

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benefit from the modifying or controlling flow of oxygen and carbon dioxide in and out of a container (column 1 lines 14-20).

### ***Response to Arguments***

46. Applicant's arguments, see arguments, filed 07/14/09, with respect to the previous 35 U.S.C. 112 2<sup>nd</sup> paragraph rejection of the claims have been fully considered and are persuasive. The previous 112 2<sup>nd</sup> paragraph rejection of the claims has been withdrawn.

47. Applicant's arguments with respect to all the pending claims have been considered but are moot in view of the new ground(s) of rejection. It is pointed out that the Akao references are no longer used and further that the second non perforated layer in the Lin reference is optional.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ERIK KASHNIKOW whose telephone number is (571)270-3475. The examiner can normally be reached on Monday-Friday 7:30-5:00PM EST (Second Friday off).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Rena Dye can be reached on (571) 272-3186. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Erik Kashnikow  
Examiner  
Art Unit 1794

/Rena L. Dye/  
Supervisory Patent Examiner, Art Unit 1794

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